No. 17929

In the

United States Court of Appeals

For the Ninth Circuit

MILLER & LUX INCORPORATED,
Appellant,

vs.

A. L. CHICKERING, et al.,
Appellees.

Appellant's Reply Brief

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INTRODUCTION

Appellant here, as in its opening brief in this appeal, adopts by reference* its argument in its brief in *Miller & Lux Incorporated v. R. H. Anderson, et al.,* No. 18033, concerning dismissal of the action for failure to state a claim and for failure to join indispensable parties. (See Anderson Reply Brief, pages 1-34.) In addition, however, it presents a further discussion which is intended to treat contentions which are more or less unique (either by subject or by emphasis) to the appellees in this action. It will then devote the remainder of its discussion to the application to defendants Chickering, Blyth and Fair of Rule 25(a) of the Federal Rules of Civil Procedure.

*Under leave granted by order of this Court on August 21, 1962.

PART I.

THE COMPLAINT PROPERLY STATES A CLAIM AND ITS DISMISSAL CANNOT BE JUSTIFIED

A. There Was No Corporate Knowledge and Approval of This Conspiracy.

Appellees attempt to show that Miller & Lux Incorporated had knowledge and approved of these frauds despite the complaint's allegations of corporate captivity (Para. XL, XLI, R. 455-6) and of no ratification (Para. XVI, R. 88-89).* First, they say as do appellees in No. 18033, that the knowledge of the guilty trustee-shareholders must be imputed to their victim corporation. To this, we merely refer the Court to our statements in the briefs in No. 18033 (Anderson Opening Brief, pages 19-45; Anderson Reply Brief, pages 18-19). Secondly, they point, as do appellees in No. 18033, to some sort of notice that the corporation should have had from its books and records. This is discussed in the briefs in No. 18033 (Anderson Opening Brief, pages 45-55); Anderson Reply Brief, pages 18-19) and we will say no more. Thirdly, they argue that the complaint indicates that the corporation was given notice of these frauds in 1939 and that the statute of limitations for fraud began to run against *all* defendants from such time. They avoid discussing the fact, however, that the very directors who they say took such knowledge for the corporation are charged in this complaint with participation in the conspiracy (Para. XXIX-XXIX-F, R. 99-109) or with having been dominated (Para. XL-XLI, R. 113).

The essence of appellees' argument on this score is that M. C. Sloss could not *be proven* to have been either a conspirator or to have been dominated (e.g. Blyth/Fair brief, pages 2-4; Bank of California brief, page 45) despite appellant's allegations that he was (Para. XL-XLI; R. 113). If there is an issue of fact here

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*The question of corporate knowledge of the participation of *these* defendants in the conspiracy (as opposed to the participation of those named in No. 18033) is discussed infra.

let it be litigated. Appellant has not the slightest fear of full litigation of any of the factual issues which may arise out of this complaint. *It is not appellant who has consistently resisted a trial on the merits;* it is only these appellees who attempt to obtain rulings on questions of fact on these motions to dismiss.

B. Appellees' Conduct in 1939 at Best Raises a Fact Issue Which Cannot Be Decided on Motions to Dismiss the Complaint.

The long elaborate argument presented by appellees for the proposition that the transactions in 1939 constituted knowledge to the corporation of these frauds and of the general conspiracy are completely irrelevant. This is a factual argument which is refuted by the allegations in this complaint and it is to the allegations alone that the Court is entitled to look.

Appellees, however, claim that appellant has made "admissions" in its complaint which contradict its allegations of corporate captivity. Their argument rests on the transactions in 1939 when the defendants in this complaint obtained knowledge of the Nickel-Houchin frauds in the Buena Vista Lake area. (See Para. XXIX-XXIXF; R. 99-109; see also Exhibits A, B, C, D; R. 202-210). While appellees contend now that their action was perfectly regular and that they "thoroughly" (Blyth/Fair Brief, page 3) considered the reports of the Nickel-Houchin frauds, the allegations of this complaint permit no such conclusions (Para. XXIX-C; R. 105).

To hear the appellees discuss the matter one would almost think that they themselves had made a full investigation not only of the Nickel-Houchin dealings but of all else alleged in this complaint. In truth, they merely sat back and permitted J. Leroy Nickel, Jr. to serve as chairman of the meeting at which they conducted this "thorough investigation" (Para. XXIX-B; R. 104-5). They just sat back and heard Fickett piously declare that there was nothing really wrong with fiduciaries buying up the land of Miller & Lux under the circumstances which were de-

scribed in the draft minutes of the Funded Debt Protective Committee (Exhibit A; R. 202) and now in this complaint. They just sat back and were content to make no bona fide inquiry into frauds which reportedly had diverted over $10,000,000 from Miller & Lux in the Buena Vista Lake area alone. It may be suggested that appellees' rosy description of the happenings in 1939 is less than accurate.

Appellant will not pursue this further. It merely suggests that the activities of Chickering, Blyth, Fair, Hunter and the Bank of California in 1939 are, at the very least, so questionable that no court is permitted to hold on motions to dismiss the complaint that they were *not* fraudulent as a matter of law. This is, at best, a fact issue which cannot be decided prior to full hearing of the case on the merits. As all disputed facts must, on motions to dismiss, be resolved in favor of the pleading party (here, appellant) the District Court could *properly* find only that, as alleged (Para. XXIX-E; R. 106-7), these activities in 1939 were intended to suppress an investigation and thereby conceal the conspiracy. They were the acts by which these defendants joined the conspiracy.

C. Appellant's Cause of Action as to These Defendants Did Not Accrue Under Section 338(4) Until 1957.

Section 338(4) of the California Code of Civil Procedure provides a three year statute of limitation for

> "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The cause of action against *these* defendants* then, could not accrue until 1957 when the draft minutes of the Funded Debt Protective Committee (Exhibit A to Complaint, R. 202-206) were surrendered to appellant. Having been concealed in the files of

*As opposed to the defendants named in No. 18033.

appellee Chickering or his attorneys until that time (Para. XXIX, XXIXE, XLVI; R. 104, 107, 116) there was no way of appellant knowing of the participation of these defendants in the frauds and the conspiracy. Until that date all that appellant could have known (had it not been dominated) appeared in the innocuous minutes of the Directors (Exhibits C, D; R. 208-210).

Appellees suggest that the cause of action as to these defendants arose when they left the Board of Directors of Miller & Lux, citing *Coombes v. Getz,* 217 Cal. 320, 18 P.2d 939 (1933). But *Coombes v. Getz* is utterly inapplicable. We have discussed this subject adequately in our reply brief in No. 18033 (Anderson Reply Brief, pages 20-22) and we will merely invite the Court to refer to that discussion.

Appellees in this matter also suggest that appellant had notice of the frauds of these defendants the moment that the first impartial trustee-shareholder was appointed following the litigation to remove Nickel and Woolley and Olsen in June 1954. But this argument defeats itself. The new trustee-shareholders had no authority to undertake any corporate investigation to ascertain the existence of a corporate cause of action and they had no authority to file a corporate complaint in the absence of a refusal by management to do so. This was a duty of the new directors and officers.

As has been said earlier, discovery of the fraud of *these* defendants could not have been made because of the concealment by one of them of the draft minutes. The earliest date on which the statute of limitations could begin to run would necessarily be in 1957—the date on which those minutes were released to appellant. But, *in any event,* the statute could not run until there was an impartial directorate and management of the corporation and that date was July 22, 1954—clearly less than three years from the date this complaint was filed (R. 3).

Appellees also offer a half-hearted suggestion that appellant's captivity ended when George W. Nickel, Jr. undertook an investigation in April-June 1954. It was this investigation which

led eventually to the litigation to have Nickel, Woolley and Olsen removed as trustees in June 1954. But it is ridiculous to contend that any activity of George W. Nickel, Jr. was "corporate" activity and that his knowledge (whatever it may have been) was "corporation knowledge" for at the time he was neither director nor officer of the corporation and he was not, and never had been, a trustee-shareholder of the corporation.

It should also be mentioned that appellees contend that nothing consequential appears in the draft minutes of the Funded Debt Protective Committee (Exhibit A to the Complaint, R. 202-206) that does not also appear in the final minutes* (Exhibit B to the Complaint, R. 206-208) or the minutes of the Board of Directors of Miller & Lux. To this argument of fact (totally improper on motions to dismiss) we merely request the Court to reread these draft minutes and compare them with the minutes of the directors (Exhibits C, D; R. 208-210). These exhibits do *not* show as a matter of law that there was a full investigation and that there was a bona fide "ratification". This Court cannot possibly hold that these exhibits *refute* as a matter of law appellant's contention that the directors' activities in 1939 were acts which suppressed a proper investigation and further concealed the existence of the conspiracy (Para. XXIX, R. 99).

D. The Houchin Settlement Has No Effect on This Litigation.

Appellees argue that the settlement of the corporation's claim against C. E. Houchin† precludes any recovery against them as the recovery would be a "double recovery" (Blyth/Fair Brief, page 41). The theory is that the *only* frauds which were brought to the attention of these defendants were the Houchin-Nickel frauds reported in 1939 and that as Houchin has settled, any recovery from appellees would constitute a double recovery by Miller & Lux. This, of course, is not so. These appellees ar

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*Which were of course not corporate records.

†Anderson Record, page 360.

charged with participation in the entire conspiracy, not merely the Buena Vista Lake, Houchin-Nickel self-dealing.

The conspiracy with which these appellees are charged did not end when the Nickel-Houchin conveyances were complete. As a matter of fact the conspiracy continued well past 1939. And as a matter of law it continued as long as the conspirators pursued their active concealment of their frauds. The fraud of these directors and treasurer may have been directed initially at the Buena Vista Lake transactions, reported in 1939. But the conspiracy which they aided and in which they participated was not so limited.

PART II.

THE DENIAL OF APPELLANT'S MOTION TO SUBSTITUTE WAS ERROR AND AN ABUSE OF DISCRETION

A. The Authorities Construing Rule 25a.

Appellant in its opening brief discussed the provisions of Rule 25a and appellees' interpretation of it as applied to the case at bar. Little is left to be said. Appellees have answered but their argument is not geared to the facts of this case. They discuss situations where the moving party failed to present its motion to substitute within the two-year period (*Anderson v. Yungkau,* 329 U.S. 482 (1947)) and situations where the motion to substitute was not made until weeks before the running of the two-year period (*Fleming v. Sebastiani,* 161 F.2d 111 (9th Cir. 1947)) and situations where Rule 25d was held to be constitutional (*Crescent Wharf & Warehouse Co. v. Pillsbury,* 259 F.2d 850 (9th Cir. 1958)). But no where do they provide even the slightest support for their proposition that mere passage of the two-year period of Rule 25a operates in all circumstances to prohibit substitution—including circumstances where the delay is attributable to no one but the Court itself.

It should be noted, in this respect, that despite repeated eferences (See e.g. Chickering Brief, pages 31, 32, 36, 40, 41) o *Iovino v. Waterson,* 274 F.2d 41 (2nd Cir. 1959) appellee

Chickering does not even mention that the Second Circuit expressly permitted substitution *where the motion was not filed until after the expiration of the two-year period.* It held that the party sought to be substituted was estopped to raise the defense. Yet appellee Chickering states that the two-year limitation is "jurisdictional" and that when the second anniversary of the defendant's death occurred, his estate gained an absolute immunity.

Even where appellees do admit that the Court in *Iovino* permitted substitution after the expiration of the two-year period (see Blyth/Fair Brief, page 14) no satisfactory explanation is offered why the Rule should be jurisdictional to some moving parties but not to others. No where do appellees explain why the plaintiff in *Iovino* was to be protected but this plaintiff in this case is not. If *Iovino* means anything, and appellees cite it throughout their briefs, then the stipulation prepared by counsel for the executor of Blyth, under which the District Judge was to set the motion for hearing, estops the executor from now relying to any extent on the two-year delay. We have discussed this in our opening brief (Page 30) and we invite the Court to reread that argument.

B. The Advisory Committee and Rule 25a.

As we said in our opening brief (page 35) *Perry v. Allen,* 239 F.2d 107 (5th Cir. 1956) saw clearly the inherent danger in the interpretation of Rule 25a which is urged by appellees. The very patronizing argument (Chickering Brief, pages 33-37, etc.) that Professor Moore "conjured up" (Chickering Brief, p. 33, line 26) his criticism of Rule 25a, and then somehow conjured up the decision of the Fifth Circuit in *Perry v. Allen, supra,* demands no reply. What does demand reply, however, is appellee Chickering's suggestion that the Advisory Committee's criticism of Rule 25a was considered and was rejected by the Supreme Court prior to the discharge of the Committee (see Chickering Brief, page 39)

The circumstances surrounding the discharge of the Committee are not in this record or in *any* record and appellee's insinuations (". . . the Supreme Court had declined to accept the argumen

and had discharged the Committee . . .") strain credibility. It may be suggested that if this Court is in the least bit interested in speculating on what was in the mind of the Supreme Court it would just as well find that no action was taken on the Committee's recommendations because for *other totally unrelated reasons,* the Advisory Committee was scheduled for changes both in personnel and in operation. It may be noted, of course, that the first recommendations of the newly formed Advisory Committee included revision of Rule 25a. The very language which is in dispute in this case was removed from the Rule. The Supreme Court approved the recommended revision and the new rule may be found at pages 13, 52 of the special section of 310 F.2d (unbound). The note of the Advisory Committee commenting on the amended rule cites the cases which are discussed by both appellant and appellees and recognizes their harshness. It would appear that Professor Moore's "conjured" criticism of Rule 25a has now found acceptance by the Supreme Court of the United States.

We suggest that what the Advisory Committee in its note recognizes as the "harshness" of *Yungkau,* and the other cases which it cites, would constitute more than mere "harshness" if they are held to be precedent applicable to *this* case. It would be "harshness" amounting to a denial of due process of law. For here there was no failure to file the motion to substitute within the two-year period as in *Yungkau.* Nor was there any failure to file the motion promptly as was the case in *Fleming.* Appellant did all that it could do and all that it was required to do under the terms of Rule 25a. The evils of Rule 25a, the evils which the recent amendment seeks to cure, are brought sharply into focus by the operation of the Rule on the facts of this case.

If it is held that these estates are lost to appellant as parties in this litigation it must be by this Court *extending* the now defunct Rule 25a far beyond where it has ever been applied before. Surely neither equity nor logic would be served by such a judicial eulogy to the inequity of the old Rule 25a.

C. The Effect of Appellees' Interpretation of Rule 25a on This Court's Appellate Jurisdiction.

Under appellees' interpretation of Rule 25a it follows as a matter of course that no matter how abusive or erroneous a District Court's handling of a motion to substitute, passage of the two-year period without an order granting substitution would be absolutely final. If the two-year period were to pass without any action by the Court (as in the case of Chickering and Blyth), or if there were denial near the end of the two-year period (as in the case of Fair), the moving party would have no effective remedy in the appellate process.

One appellee indeed reports in his brief (Blyth/Fair Brief, pages 19-20) the concern shown by this Court on the question of the two-year limit as it affected the Fair motion. The motion had been denied by the District Court on March 12, 1962. Judgment was entered March 30, 1962. The motion to dismiss the appeal was heard on May 21, 1962. The second anniversary of Mr. Fair's death was July 8, 1962.

To the best of appellant's knowledge, Judge Browning never suggested* that the Court could or would take any action to protect appellant before the expiration of the two-year period as to the Fair motion. Indeed, neither he nor any other judge ever suggested what remedy would be available. *And certainly appellees have never suggested what remedies were available.* The motion to substitute had been denied for reasons touching only on the sufficiency of the complaint. If dismissal of the complaint was improper, and appellant argues strongly that it was, then there is nothing left to support the denial of the motions to substitute.

The propriety of the denial of the motions to substitute could not be determined until both this case and No. 18033 were fully argued and decided. Does appellee Fair seriously suggest that under *any* acceleration of this appeal the record could have been

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*Appellant remembers Judge Browning's show of concern that the two-year period was about to expire as to Mr. Fair's estate but we cannot remember the exact discussion on this matter and we have been informed that the tape recording of it is not available for the use of the parties.

prepared by July 8, 1962?* Does it contend that the questions of these cases could have been briefed by July 8, 1962? It is to be pointed out that appellees in these two cases have found the questions on appeal to be so extensive as to require the filing of four briefs in this case and twenty-two briefs in No. 18033. Could those have been prepared by July 8, 1962? We need not point out that even if the record had been available and the parties had been physically capable of presenting their written argument before July 8, 1962, it cannot be suggested that the oral argument could have been heard and this Court's decision prepared and mandate issued all before July 8, 1962.

The Fair situation is, of course, but one of three in this case. Under appellees' interpretation of Rule 25a both the Chickering and Blyth estates gained complete immunity on the second anniversaries of Mr. Chickering's and Mr. Blyth's death. No appeal, under their view, could then be had regardless of the error or abuse of discretion of the District Judge.

Appellant cannot believe that a procedural rule of Court can thus defeat this Court's appellate jurisdiction.

D. The Delay in Acting on These Motions Can in No Way Be Attributed to Appellant.

Appellees suggest that there was something which appellant was required to do (see e.g. Blyth/Fair Brief, pages 6, 8, 13-18) and did not do, to assure prompt determination of the motions to substitute. Their argument is less than realistic.

What, for instance, was appellant to do with respect to the substitution of the executor of Mr. Chickering? His death occurred on January 6, 1958 and the motion to substitute his executor was presented to the District Court as promptly as could be desired (R. 38). It was argued by the parties and *it was taken under submission* by the District Judge on February 13, 1959 (R. 4, 518-546). Thereafter the parties were told by the judge that "a great

*As a matter of fact the first incomplete record in these cases was not delivered to this Court until *after* July 8, 1962 and was not printed until December 1962.

deal of work has been done" on the pending motions and that that work was "very near the process of conclusion" (R. 662). He stated that he wanted to "dispose of what I have before me" (R. 662). As these statements made on April 10, 1959, clearly indicate, appellant was entitled to believe that a decision on this motion to substitute (and on other pending motions) would be rendered in a short time or at least before the expiration of the two years on January 6, 1960.

The same is true with respect to the motion to substitute the executor of defendant Blyth who died on August 25, 1959 (R. 283). It had been filed on September 22, 1959, promptly after the rejection of appellant's claim on the estate (R. 332). And the District Judge led the parties to believe that this motion also was to be considered promptly. On April 14, 1960* Judge Carter announced that he was in the midst of an antitrust case but that he was going to "arrange his calendar" and would have time in about two weeks to hear arguments on the Blyth substitution motion (R. 666). He stated that he would set it down for argument "right away" (R. 666). The motion was not set for hearing, however, until Judge Wollenberg finally took charge of the case (after Judge Goodman had withdrawn) and it was not until January 1962 that a hearing was actually had (R. 478).

It has already been noted that these appellees who attempt to criticize appellant for not in some way forcing the District Court to determine the matters before it, fail completely to indicate just *how* that could have been done. We were told by the Chief Judge of that Court in early 1961 that it was necessary to transfer the case to himself as Judge Carter was too busy with other matters "which the Court had placed in his hands" (see Anderson Brief, page 9).

Had any remedy been available, to whom would appellant have addressed its request for action? To Judge Carter who was by the words of his own Chief Judge too busy to handle the matters

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*After the filing of the stipulations prepared by appellee that the matter would be set *by the Court* for hearing (R. 291-293).

connected with this case? To Judge Goodman who withdrew after appellant's suggestion of a conflict of interest? (R. 7) To Judge Wollenberg who was not as yet assigned to the case? (R. 7) It may be suggested that appellees' "remedy" was a shallow one.

Furthermore, there was no duty for appellant to set itself up as a self-appointed watchdog of the District Court. There is no presumption that courts of the United States will not act promptly especially in the face of repeated assurances by the Court that its action would soon be forthcoming. Yet appellees suggest that such a duty did exist and that appellant is "negligent" and cannot complain when its cause of action as to these estates is threatened. Appellees contend that for these reasons a substantive right may be lost to a party engaged in litigation in federal court, simply because Rule 25a, a rule of procedure, says so. The Rule cannot require these results on the facts of this case; if it does, it is patently unconstitutional.

E. The Denial of These Motions Cannot Be Justified as an Exercise of Discretion.

As was pointed out in appellant's opening brief (page 10) the only reference to these motions in the District Judge's memorandum opinion of March 12, 1962 was:

> " . . . Motion [sic] of plaintiff to substitute personal representatives of deceased defendants Allen L. Chickering, Charles R. Blyth, and Harry H. Fair are denied, no purposes would be served in granting the same in view of the foregoing. It is further noted that as to the Allen L. Chickering and Charles R. Blyth motions over two years have elapsed since their deaths (Rule 25(a)(1) F.R.C.P.)" (R. 475)

Appellees say that the District Judge denied these motions as a proper exercise of discretion, on the ground of hardship in the administration of the various estates. But this argument is totally without support. There is not the slightest suggestion that he considered the alleged hardship to the estates. The memorandum

opinion makes it clear that he found it advisable to deny *these* motions because he considered (1) that the complaint failed to state a claim and (2) that indispensable parties had not been joined. There is no reference to any "hardship" and there is no reference to any exercise of discretion. In fact, his *only* reference to Rule 25a is, as can be seen above, merely one of "noting" that as to Chickering and Blyth the two-year period had expired.

Furthermore, appellant is at a loss to explain how appellees can logically suggest that a court could *in its discretion* deny these motions to dismiss because the frauds and the conspiracy occurred some time in the past.* Under the allegations of this complaint it was these very parties who contributed to that delay. If this is the rule, then we must recognize that the courts are offering a jackpot of complete immunity to those who can most skillfully conceal their wrongdoing.

It is ironic that this argument based on "discretion" is made most vehemently by the executor for Mr. Chickering—the very defendant who was responsible for emasculating the final minutes of the Funded Debt Protective Committee (Exhibit B, R. 206-208) and who concealed in his possession (or that of his attorneys) the Draft Minutes (Exhibit A, R. 202-206) until 1957 (Para. XXIX-A, R. 103-104). It is the executor of the same Mr. Chickering who devotes his brief (Chickering Brief, pages 60-74) to an argument that the estate is being inconvenienced by the existence of this claim against it. Appellees' anguished cries of "delay" can evoke little sympathy because the delay was no one's fault but their own.

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*Their attempts to illustrate potential difficulty in appellant proving its case are completely irrelevant. It may be noted that while appellees point out that several of the conspirators have died, they do not discuss the several years of costly discovery in which both sides have participated including depositions, interrogatories, etc., all of which properly perpetuate testimony.

CONCLUSION

It is respectfully suggested that the dismissal of appellant's complaint and the denial of the motions to substitute was error and an abuse of discretion and that the judgment of the District Court should be reversed and the matter remanded for trial.

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March 12, 1963

CERTIFICATE PRESCRIBED BY RULE 18(2)(G) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Mary C. Fisher